No. 20,091

United States Court of Appeals

For the Ninth Circuit

UNIVERSAL UNDERWRITERS INSURANCE COMPANY, a corporation,
Appellant,

vs.

AMERICAN MOTORISTS INSURANCE COMPANY, a corporation,
Appellee.

REPLY BRIEF FOR APPELLEE

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JURISDICTION

The jurisdictional statement of appellant is correct and is accepted by appellee.

STATEMENT OF FACTS

Under the caption of its brief, "Statement of the Case," appellant has purported to state the facts of this case. The facts are found in the parties' signed "Stipulation as to Certain Facts and Testimony of Witnesses," which is a part of the record and upon which, plus some additional testimony taken at the trial, the decision of the trial court is predicated.

Because appellee considers appellant's statement incomplete and perhaps slightly partisan, we presume to submit here for the court's assistance a more complete resume of the facts:

Eris McCarthy is the wife of Royal E. McCarthy. Royal E. McCarthy is one of three general partners doing business as K. B. McCarthy (said partnership is hereinafter referred to as McCarthy), a new and used car dealer in Eureka.

On August 6, 1957, McCarthy as vendor and Cecil Wolf as vendee entered into a conditional sales contract for the sale and purchase of a new 1957 Dodge automobile (hereinafter referred to as Dodge). McCarthy forthwith assigned the conditional sale contract to Crocker-Anglo National Bank (hereinafter referred to as Bank) and guaranteed same with recourse. Simultaneously with execution of the conditional sales contract, Wolf executed an irrevocable and non-cancelable "Authorization for Transfer and Delivery of Certificate of Ownership" which authorized and instructed Bank to (a) deliver the Certificate of Ownership for Dodge properly endorsed, *only* to McCarthy as soon as the conditional sales contract was satisfied, and (b) accept payment of the amount due under the conditional sales contract. The authorization notified Bank that release thereof must come from McCarthy, to whom Wolf's equity in the Dodge had been pledged as security for labor and/or materials installed therein. This authorization was never released to McCarthy. Dodge was registered in the

Department of Motor Vehicles with Wolf as registered owner and Bank as legal owner and remained that way until June 30, 1958.

By April 22, 1958, Wolf was delinquent in his payments. Bank turned the account over to Joseph Schieber, who operated an independent collection agency, with instructions to collect the two delinquent installments or one delinquent installment with a promise to pay the second delinquent installment. Wolf could not pay the delinquent installments, so Schieber repossessed the Dodge on April 23, 1958, and delivered possession of it to and received a receipt from McCarthy.

On April 24, 1958, McCarthy wrote Wolf advising him of the repossession, his liability for deficiency, for him to get in touch with McCarthy immediately, and that no action would be taken for five days. Wolf couldn't borrow the money to take the car back as requested by Royal E. McCarthy, relinquished the Dodge to McCarthy so it could be sold immediately and signed a power of attorney to transfer title to Dodge.

McCarthy performed reconditioning work on Dodge on April *26* and May *2*. McCarthy took Dodge into *stock* on April 29 as "Used Car 5019R."

On May 4, 1958, while Eris McCarthy was driving Dodge with express permission of Royal E. McCarthy, she was involved in an auto-pedestrian collision with Vicki Graf.

On June 30, 1958, McCarthy paid Bank balance due on the Wolf contract and received Dodge's certificate of ownership endorsed by Bank as legal owner. Also on June 30, 1958, B. Green, who was McCarthy's contract clerk, signed, pursuant to the power of attorney previously executed by Wolf, Dodge's certificate of ownership on behalf of Cecil Wolf as registered owner so as to transfer Dodge to Byrd Hey who purchased Dodge from McCarthy.

On December 31, 1957, Bank and McCarthy had entered into a dealer plan agreement which provided that upon default of any contract by purchaser, McCarthy would pay Bank the contract balance, less unearned discount; that upon such payment Bank would assign contract to McCarthy; that if Bank tenders possession of vehicle to McCarthy without receiving immediate payment, McCarthy as trustee will execute and deliver to Bank as entruster, upon request, a trust receipt; and that until such payment the vehicle shall be subject to order of Bank.

An action filed against Eris McCarthy as a result of the accident of May 4, 1958 was defended by appellent (hereinafter referred to as Universal) and subsequently compromised. In this action Universal seeks to recover from appellee (hereinafter referred to as American) its expenses in the defense of said action and the amount paid by it in compromise.

During the argument to follow reference to some facts not specifically mentioned in the foregoing statement may be necessary and such reference will then be made.

ERRORS RELIED ON BY APPELLANT

Appellant specifies numerically three errors on which it relies to seek a reversal of the judgment of the trial court: (1) that in granting judgment for appellee the court erred; (2) that the court erred in holding that Eris McCarthy was not primarily covered by American's insurance policy issued to Bank, and (3) the failure to find expressly that Eris McCarthy was driving the Dodge at the time of the accident with the permission of Bank.

Appellee disputes all of these claimed errors. In the argument to follow we will show that the judgment of the trial court is sustained by the evidence, not only on the theory adopted by the court, but also upon one or both of two other theories.

With respect to the third assigned error, it should be noted that in its "Memorandum and Order" the trial court said: "It will be assumed *arguendo* that such permission existed." The decision was, therefore, based upon permissive use which is equivalent to a finding.

SUMMARY OF REPLY ARGUMENT

The trial court's decision is upon the theory that Bank was, under the law set forth in its memorandum, the owner of the Dodge; that Eris McCarthy was operating the Dodge with Bank's permission ("assumed *arguendo*"); that McCarthy was a bailee who permitted another to drive the vehicle and is, therefore, deemed an "operator" (Sec. 17154 Calif.

Vehicle Code); that as between the owner (Bank) and the operator, the latter bears the burden of liability; that the insurance carriers here involved are in no different position than the respective insureds, and that Universal may not recover from American.

Upon the evidence before it the judgment of the trial court upon that theory is fully supported and sound. It should be noted that nowhere in appellant's brief is Section 17154 of the California Vehicle Code discussed or even mentioned. The applicability of the section to the facts is not challenged, nor could it be.

But, furthermore, it can be and should be convincingly demonstrated that the same evidence would support findings for a judgment on either one of two other theories, to wit: (1) that under the law McCarthy, and not the Bank, was the owner of the Dodge at the time of the accident; or (2) that at least McCarthy and Bank were co-owners of the Dodge. The judgment is sound and sustainable on either of these additional theories.

ARGUMENT

I. COMMENT ON APPELLANT'S PREAMBLE.

This is an action between two insurers—Universal seeks reimbursement from American for a loss and expense Universal incurred as the result of an action defended by Universal on behalf of Eris McCarthy.

It is not an action by a claimed insured against a claimed insurer. There is no reason as between

the two insurers to invoke principles of public policy ordinarily indulged between an insured and his insurer. The broad principles of liberal construction of insurance policies need not and should not be resorted to in a controversy between two insurers over the interpretation of their respective policies.

Appellant's preamble reveals that it is treating this as a controversy between Eris McCarthy and American, which it is not. Eris McCarthy is not a party to nor does she have the slightest interest in this case. The claim against her was defended and compromised by Universal, which it may have done as a volunteer if, as it contends, it had no obligation to do so.

In any event, the rules of construction of "ambiguities" against an insurer and of resolving all "doubts" against the insurer should not be applied in favor of another insurer.

II. THE JUDGMENT AND DECISION AS RENDERED ARE SOUND.

This point has been succinctly stated in the foregoing Summary of Reply Argument. It needs only some amplification.

The trial court believed the law as it viewed it required a finding that Bank was the owner of the Dodge. This was based entirely on vehicle registration procedures prescribed by the California Vehicle Code and their construction by decision. We will

later review this subject of ownership. But, accepting that finding and assuming that Eris McCarthy was operating the Dodge with Bank's permission, the lower court also found that McCarthy was a "bailee" of the vehicle under Section 17154 of the Vehicle Code of California, which at that time read:

> Bailee as operator. "If the bailee of an owner with the permission, express or implied, of the owner permits another to operate the motor vehicle of the owner, then the bailee and the driver shall both be deemed operators of the vehicle of the owner within the meaning of Sections 17152 and 17153."

The essence of the lower court's decision is found in the penultimate paragraph of its "Memorandum and Order," reading as follows:

> "Section 17150 provides only for owner's liability to injured parties. Sections 17152 and 17153 establish that an owner who is held liable under §17150 may recover from the operator. Section 17154 provides that a bailee who permits another to drive the vehicle with the express or implied permission of the owner is himself deemed an operator within the meaning of the aforesaid sections. As between the owner and the 'operator,' then the ultimate burden is to be borne by the operator. Accordingly, it would be anomalous to permit such an operator to recover from the owner for his liability (Cf. Truck Insurance Exchange v. American Surety Company of New York, 358 F.2d 811 [United States Court of Appeals for the Ninth Circuit, No. 19,137, November 13, 1964]), whether satisfied by payment

on a judgment or settlement. The insurance carriers here are in no different position than their respective insureds."

(The "Sections" referred to are those of the Vehicle Code of California).

As previously noted, Section 17154 of the California Vehicle Code is not discussed or even mentioned in appellant's brief and the applicability of the section to the facts of this case is not challenged. Of the trial court's memorandum-decision appellant states that: "The District Court erroneously believed that the finding in this case was governed by *Truck Insurance Exchange v. American Surety Company of New York.*" It is apparent that appellant is mistaken and that the court did not believe, erroneously or otherwise, that the cited case "governed" this case, but it does support the court's statement that it would be anomalous to permit an "operator" to recover from an "owner" for the former's liability, whether satisfied by payment on a judgment or settlement.

Perhaps this brief could end here, but there are other reasons for the affirmance of the judgment of the lower court which may be discussed.

III. OWNERSHIP OF THE VEHICLE.

As asserted in the Summary of Appellee's Argument, appellee contends that the evidence before the trial court and the applicable law would support the judgment for American upon the theory that Mc-

Carthy and not the Bank was the owner of the vehicle or that McCarthy and Bank were co-owners. In either case Universal could not recover. A look at the evidence and the law on this subject of ownership is indicated.

A certificate of registration pertaining to the transfer of title or any interest in a vehicle does not necessarily or conclusively establish true ownership. *(Davis v. Joseph,* 148 C.A.2d 899, 905; 307 P.2d 958.)

Wolf executed a power of attorney to transfer Dodge and relinquish all rights to McCarthy. This was a transfer of his rights as a conditional buyer, subject to Bank's rights to receive the balance due as assignee of the conditional sales contract. *(Bowden v. Bank of America,* 36 Cal.2d 406, 414; 224 P.2d 713; *Davies-Overland Co. v. Blenkiron,* 71 C.A. 690; 236 P. 179.)

It is presumed that things which a person possesses are owned by him and that a person is the owner of property from exercising acts of ownership over it. (Calif. Code Civil Procedure, Section 1963, subdivisions 11 and 12; *Hamilton v. Madison Auto Sales Co.,* 94 C.A.2d 619, 623; 211 P.2d 335.)

The Dodge was in possession of McCarthy from April 23, 1958 until delivered to Byrd Hey on June 30, 1958. During that time McCarthy exercised innumerable acts of ownership of Dodge: (1) on April 24 wrote Wolf telling him he should get in touch with them immediately and that McCarthy would wait five days from date of this letter before taking

action; (2) accepted power of attorney to transfer vehicle from Cecil Wolf; (3) on April 26, 1958 McCarthy lubricated the Dodge and repaired it; (4) on April 29, 1958 McCarthy took the Dodge into stock and numbered it "Used Car 5019R"; (5) on May 2, 1958, McCarthy again lubricated and repaired Dodge; (6) on May 3, 1958, Royal E. McCarthy drove Dodge home; (7) on May 4, 1958, Royal E. McCarthy gave Eris McCarthy permission to drive Dodge; (8) McCarthy sold Dodge to Byrd Hey; (9) McCarthy transferred Dodge to Byrd Hey on June 30, 1958 by signing Cecil Wolf's name pursuant to the power of attorney.

Bank had only a security interest by reason of being an assignee of the conditional sales contract. *(Bowden v. Bank of America, supra.)*

When McCarthy paid off the contract balance it did not use an affidavit of repossession to transfer the title, but confirmed its ownership by using the power of attorney.

McCarthy actually became the owner of Dodge immediately upon transfer from Wolf, but did nothing to secure a new registration of Dodge. McCarthy cannot take advantage of its own wrong in failing to have Dodge registered in its name as registered owner. *(Schmidt v. C.I.T. Corporation,* 14 C.A.2d 92 at 95; 57 P.2d 1016.)

If the foregoing facts fall short of establishing that McCarthy and not the Bank was the owner of the Dodge at the time of the accident, the least that

can be said is that McCarthy was a co-owner of the vehicle.

Co-ownership need not be created by mutual consent, but may arise by operation of law. *(Krum v. Malloy,* 22 Cal.2d 132; 137 P.2d 18.) Ownership or co-ownership of the vehicle by McCarthy would preclude recovery in this action by Universal against American, if indeed it be necessary to resort to either status to uphold the judgment. If this court agrees with the trial court's finding that McCarthy was a bailee of the vehicle, no further consideration of the subject of ownership of the vehicle will be necessary.

IV. PERMISSIVE USE OF VEHICLE.

Because of the assignment of error by appellant of the failure to find expressly that Eris McCarthy was driving the Dodge with the Bank's permission, a review of the record on that subject will dispel that claim of error.

The record reveals, and appellant concedes (Appellant's Brief, p. 9) that Eris McCarthy was driving with the express permission of Royal E. McCarthy, a general partner in McCarthy. If, as appellee believes, the record shows McCarthy and not the Bank was the owner of the Dodge, no further comment on this subject would be necessary.

In cases of co-ownership it is a question of fact whether the operation of the vehicle was with or without the consent, express or implied, of an owner who

was not personally participating in the operation in question. *(Krum v. Malloy, supra.)*

Express permission of the Bank is not claimed and evidence to support a finding of implied permission is noticeably lacking. There was no evidence Bank had any knowledge of any use of the Dodge after McCarthy obtained possession of it—the Bank only demanded, and eventually received, payment of the balance due it. There was no testimony of any custom of McCarthy to make personal use of repossessed vehicles as was done in the case of this Dodge.

Assuming co-ownership, one must remember the nature of the parties—the Bank as a financial institution and McCarthy as an automobile dealer. Used cars in stock of an automobile dealer are reasonably intended for sale. While it may not be unrealistic to imply permission to demonstrate the car to a prospective purchaser, such was not the case here. This was a case where the use of the Dodge was not for any mutual benefit of the co-owners. The use was not connected with the business activities or business benefit of McCarthy as an automobile dealer. The use of the Dodge was not one customarily found in the automobile business.

Since an automobile and its component parts and accessories depreciate by use, it is not reasonable to imply permission from the absent co-owner for the Dodge to be used and thus depreciated without any intended direct or indirect benefit accruing to this absent owner. No co-owner of a car which was being held for sale by a co-owner automobile dealer would

expect a partner and his family to use the car for their own personal necessities and conveniences.

If the finding that the Bank was the sole owner of the Dodge is sound, the facts still do not show, by implication or otherwise, permission of Bank for Eris McCarthy to operate the vehicle for her own personal use.

The dealer agreement between Bank and McCarthy specified that Dodge would be subject to order of Bank. Admittedly, Bank never gave any orders to McCarthy regarding Dodge. No testimony was produced to show any prior or subsequent orders which permitted operation of a repossessed vehicle for the personal use of the wife of a partner.

> "A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or a third party. The person giving is called the depositor, and the person receiving is the depositary." (Civil Code, Sec. 1814.)

If Bank be the sole owner, delivery of Dodge to McCarthy and acceptance by McCarthy makes this a deposit with Bank the depositor and McCarthy the depositary.

A depositary may not use the thing deposited, or permit it to be used, for any purpose without the consent of the depositor. (See Sec. 1835, California Civil Code.)

The dealer agreement provided that Dodge should be held subject to the order of Bank. In the absence of any orders from Bank, McCarthy had no right

to let Eris McCarthy use the Dodge. (Sec. 1835, Civil Code.) There was no evidence of any oral or written orders directing or permitting the use of the Dodge for the personal convenience or necessity of Royal E. McCarthy or Eris McCarthy.

V. THE INSURANCE POLICIES.

Consideration of the insurance policies issued by Universal and American is perhaps necessary because of the court's finding that the Bank was the owner of the Dodge and the assumption of the trial court that it was being operated by Eris McCarthy with Bank's permission; and also because of the contention of appellant that Eris McCarthy was an insured under American's policy, that American's policy was "primary" and provided the sole protection to her for the accident in question, and that Universal's policy was "excess" coverage only for her.

Universal's Policy.

Universal's policy issued to McCarthy contains Endorsement F 6735 UU which provides as here material:

> "GARAGE
>
> (Premises-Operations-Automobile)
>
> It is agreed that such insurance as is afforded by policy for Bodily Injury Liability and for Property Damage Liability applied to the hazard defined below, subject to the following provisions:

A. Hazard Defined.

The ownership, maintenance or use of the premises for the purpose of an automobile dealer, repair shop, service station, storage garage or public parking place, and all operations necessary or incidental thereto; and the ownership, maintenance or use of any automobile in connection with the above defined operations, and the occasional use for other business purposes *and the use for non-business purposes of (1) any automobile owned by or in charge of the named insured* and used principally in the above defined operations, and (2) *any automobile owned by the named insured in connection with the above defined operations for the use of* the named insured, *a partner therein,* an executive officer thereof, or *a member of the household of any such person.*

* * * *

B. Definition of Insured (Limited Additional Interests)

With regard to the Hazard Defined in this endorsement, the Definition of Insured Agreement of the policy is null and void and the following Definition of Insured applies:

The unqualified word 'insured' includes the named insured and also includes (1) any partner, employee, director or stockholder thereof while acting within the scope of his duties as such, and any person or organization having a financial interest in the business of the named insured covered by this policy, and (2) any partner or employee or director or stockholder thereof or a member of *the household of* the named insured or *such partner* or employee or director or stock-

holder, *while using an automobile covered by this policy* or when legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission, and (3) any other person or organization legally responsible for the use thereof only while such automobile is operated by the named insured or any such partner or employee or director or stockholder or member of the household of the named insured or partner or employee or director or stockholder, provided the actual use of the automobile is by the named insured or with his permission.

* * * *" (Italics ours)

Responsive to the California Financial Responsibility Law, this policy bore a designation of the insured partners as K. B. McCarthy, Helen McCarthy, Royal McCarthy, *Eris McCarthy,* George E. Little, Patricia M. Little and Floyd Todd dba K. B. McCarthy; and K. B. McCarthy, Helen McCarthy, Royal McCarthy, *Eris McCarthy,* George E. Little and Patricia M. Little, *as individuals.* A certificate filed with the Department of Motor Vehicles certifies that the policy is applicable "to all motor vehicles * * * operated * * * by the employer * * *". Eris McCarthy is specifically named as an "employer" on the reverse of this certificate, the effect of which is that of an endorsement to the policy and controls over any other language in the policy itself.

The Dodge automobile was in charge of McCarthy and was being used for non-business purposes by Eris McCarthy. Consequently she is an insured under this

policy by the provisions of paragraph B(2) of the endorsement.

It is important to note that Endorsement F 6735 UU does not contain an "other insurance" clause. Neither does it incorporate by reference the "other insurance" clause found in paragraph 14 of the policy conditions. Endorsement F 6735 UU commences by saying:

> "It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability and for Property Damage Liability applies to the hazard defined below, subject to the following provisions."

No provision following refers to or incorporates Policy Condition 14, which does contain an "other insurance" clause. It should be further noted that paragraph 3, Endorsement AL 6629h, "Use of Other Automobiles—Broad Form", has a specific "other insurance" clause. Endorsement L 6370e—"Individual as Named Insured" incorporates the "other insurance" clause found in Condition 14 of the policy. Endorsement OCC—Comprehensive General Automobile Liability Policy—states that "All other terms and conditions of this policy remain unchanged."

It is respectfully submitted that the "other insurance" clause of Policy Condition 14 was not intended to be and is not a part of Endorsement F 6735 UU because of the particular language contained in said endorsement applying the bodily injury liability subject to specific provisions which fail to refer or incorporate the provisions of Policy Condition 14, while

other endorsements either provide a specific "other insurance" clause or incorporate Policy Condition 14.

If there is any ambiguity in Universal's policy, it must be resolved against Universal. If there is a conflict between the endorsement and the body of the policy, the endorsement controls. *(Continental Casualty Company v. Phoenix Construction Company,* 46 Cal.2d 423, 430-1; 296 P.2d 801.)

It is submitted that Universal's policy, by reason of its failure to specify an "other insurance" clause in Endorsement F 6375 UU and being certified, makes Universal's primary coverage for the accident in question.

American's Policy.

By paragraph 6 of Declarations of this policy the automobiles *owned* by Bank are listed on the schedule. Nowhere in that schedule of 113 automobiles is the Dodge listed. Since Dodge is not a scheduled owned automobile, Eris McCarthy cannot claim coverage for driving an owned automobile described in the schedule of vehicles owned by Bank.

The only coverage in American's policy issued to Bank which could cover the Dodge is found in Endorsement No. 4, which provides:

> "In consideration of $979.00 (included) flat premium not subject to audit, it is understood and agreed that coverage is afforded for *repossessed* automobiles.
>
> "This insurance applies *only* to the *named insured*. The insurance shall be *excess* insurance

> over any other valid and collectible insurance available to the named insured against a loss covered hereunder." (Emphasis added.)

This is a special endorsement which extends *excess* coverage to Bank *only* for repossessed automobiles. As such a special endorsement, its language controls over the general provisions of the policy.

> "Where general and specific provisions of a contract deal with the same subject matter, the specific provisions, if inconsistent with the general provisions, are of controlling force." (*Continental Casualty v. Zurich Ins. Co.,* 57 Cal.2d 27 at p. 35; 366 P.2d 455.)

The "other insurance" clause (paragraph 14 of Conditions) of the general language of American's policy is superseded by the express language of Endorsement No. 4 providing only *excess* insurance. Further, the definition of "insured" found in paragraph III of the insuring agreements is likewise superseded by the express language of Endorsement No. 4 to afford this coverage *only* to Bank.

The courts have uniformly upheld the validity of excess coverage clauses. (See *Continental Cas. Co. v. Zurich, supra,* where the court imposed the primary liability upon Zurich and prorated the amount of the judgment over and above that coverage among the two *excess* policies; and *McConnell v. Underwriters at Lloyd's,* 56 Cal.2d 637 at 646; 365 P.2d 407, where the court held that Lloyd's *excess* policy did not attach until the primary had been exhausted.)

Concededly, the case of *Inter-Insurance Exchange v. Ohio Casualty Company,* 58 Cal.2d 142; 373 P.2d 640, and *Wildman v. Government Employees' Ins. Co.,* 48 Cal. 2d 31; 307 P.2d 359, hold that provisions in a policy purporting to exclude certain classes of permissive users are void as against public policy. Here there is *no exclusionary* language in Endorsement No. 4. Rather, Endorsement No. 4 *extends excess* coverage *only* to Bank for repossessed cars, something in addition to the other policy provisions because coverage would not otherwise be afforded under American's policy for repossessed automobiles.

An insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected. *(Continental Casualty Co. v. Phoenix Construction, supra.)*

If Endorsement No. 4 could be considered void as against public policy under the *Wildman* and *Inter-Insurance Exchange* cases, then the policy should be read with said endorsement deleted. Such a reading shows no coverage for Dodge as an owned automobile and neither the Bank nor anyone else, including Eris McCarthy, has coverage for this incident under the American policy.

To extend Endorsement No. 4 by application of the *Wildman* and *Inter-Insurance Exchange* cases to afford coverage to Eris McCarthy would be to rewrite the insurance contract. But if rewritten to cover Eris McCarthy, still, by its express terms, it only affords *excess* coverage. Since Eris McCarthy had ample

basic or primary coverage under Universal's policy to pay the loss, the excess coverage of American does not come into effect.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the trial court in this case is sound and proper, that the court did not err in any of the respects claimed by appellant, and that the judgment should be affirmed by this honorable court.

Dated, San Francisco, California,
January 12, 1966.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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